

Supreme Court, U. S.

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IN THE

MICHAEL RODAK, JR., CLERK

**Supreme Court of the United States**

**OCTOBER TERM, 1976**

**No. 76-959**

**JOHN NEWMAN,**

**Respondent,**

**versus**

**C. MURRAY HENDERSON, WARDEN,**

**Petitioner.**

**On Application For A Writ Of Certiorari**

**Directed To The United States**

**Fifth Circuit Court Of Appeals**

**REPLY BRIEF OF  
STATE OF LOUISIANA, PETITIONER**

**WILLIAM J. GUSTE, JR.,  
ATTORNEY GENERAL OF  
LOUISIANA**

**HARRY F. CONNICK,  
DISTRICT ATTORNEY FOR THE  
PARISH OF ORLEANS**

**LOUISE KORNS,  
ASSISTANT DISTRICT  
ATTORNEY FOR THE  
PARISH OF ORLEANS**

**Criminal Courts Building  
2700 Tulane Avenue  
New Orleans, Louisiana 70119  
Telephone: (504) 822-2414**

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REPLY BRIEF OF  
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MAY IT PLEASE THE COURT:

In the Opposition which he has filed in this Court, Newman asserts that *Barksdale v. Louisiana* and its companion cases form no part of the instant proceeding.

In order to rebut this contention and to substantiate the arguments set out in the Petition For Certiorari herein as expeditiously as possible, the State of Louisiana is attaching to this Reply Brief copies of

both Louisiana's and Newman's briefs in this proceeding in the Fifth Circuit Court of Appeals. (Copies of these Fifth Circuit briefs are not attached to this printed reply brief, but they accompany the ten typewritten copies of Louisiana's reply brief which were filed with this Court on March 18, 1977.) Certified copies of these briefs will be forwarded to this Court as soon as the Fifth Circuit Clerk's Office can obtain them from the record herein, which is not in New Orleans at this time and must be sent for.

From the attached briefs it is clear that the present case, *Newman v. Henderson*, was consolidated in the United States District Court with *Francis v. Henderson*, 425 U.S. 536 (1976), and also with this same famous *Barksdale* case, the record in which is at issue here, also pending at that time in the United States District Court on petition for habeas corpus based on alleged jury discrimination, *sub nom. Barksdale v. Henderson*.

These briefs also establish that the State of Louisiana relied on the *Barksdale*, *Simpson*, etc., records in its alternative argument<sup>1</sup> — (the first contention being waiver under *United States v. Davis*) — in the Fifth Circuit,<sup>2</sup> and that in the Fifth Circuit Newman defended against the *Barksdale*, et al. contentions of the State of Louisiana solely on the ground that although consolidated with *Barksdale* in the United States District Court hearing, Newman was not a par-

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<sup>1</sup> See p. 13 et seq. of Louisiana's Brief in *Newman v. Henderson*, no. 73-3393, and *Francis v. Henderson*, no. 73-3670 in the Fifth Circuit Court of Appeals, attached hereto.

<sup>2</sup> *Ibid.* p. 7 et seq.

ty to the State Court proceedings — the identical reasoning relied on by the Fifth Circuit in its opinion herein.<sup>3</sup>

And now, in view of the fact that the issues before this Court in this Application For Certiorari have been enlarged by Newman in his Opposition beyond the scope of the Fifth Circuit's opinion herein, as an additional ground in its Petition for Certiorari in this case the State of Louisiana contends that the proceedings held below, and particularly the evidentiary hearing held in the United States District Court in this matter, are absolutely null and void under *Wingo v. Wedding*, 418 U.S. 461 (1974), because the evidentiary hearing concerning alleged racial discrimination in the selection of Newman's, Francis', and Barksdale's juries was conducted by a United States Magistrate who had no jurisdiction to hold such a hearing. *Wingo v. Wedding* was decided by this Court after this case was briefed and argued in the Fifth Circuit.

Pertinently, *Barksdale v. Henderson*, consolidated with the instant case in the United States District Court, was not appealed to the Fifth Circuit along with *Newman v. Henderson* and *Francis v. Henderson*, and subsequently the United States District Court, on the basis of *Wingo v. Wedding*, and because the *Barksdale* case is of such far-reaching import, set aside its judgment granting *Barksdale's* Petition For Habeas Corpus in this proceeding.

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<sup>3</sup> In fact, in his Brief in the Fifth Circuit, attached hereto, counsel for Newman concedes that "Barksdale's factual record may be illuminating on the issues involved in this case . . ." p. 17.

Similarly, Louisiana urges this Court to set aside this invalid evidentiary hearing, conducted by a United States Magistrate without jurisdiction, which is the basis of the judgment granting habeas corpus to Newman herein.

#### **CONCLUSION**

Regardless of what counsel for Newman states in his Opposition herein and what may be shown in the Newman record itself which he has requested to be forwarded to this Court, the Louisiana records in *State v. Barksdale*, et al., have been a vital part of this proceeding since its inception and consolidation with *Barksdale v. Henderson* in the United States District Court.

Moreover, as we argue in our Petition For Certiorari herein, if the Louisiana trial court's reliance on *State v. Barksdale* in Newman's state habeas corpus suit was a decision on the merits barring waiver under *Davis v. United States* and *Francis v. Henderson*, the Fifth Circuit was bound to evaluate Newman's jury discrimination claim in light of the *Barksdale*, *Simpson*, etc. records.

On the other hand, if Newman has no concern with *State v. Barksdale* because Newman was not a party to the State proceeding, there was no determination on the merits in the Louisiana trial court in the instant case, and hence the doctrine of waiver under *Davis* and *Francis* applies herein.

Respectfully submitted,

**WILLIAM J. GUSTE, JR.,  
ATTORNEY GENERAL  
OF LOUISIANA**

**HARRY F. CONNICK,  
DISTRICT ATTORNEY FOR THE  
PARISH OF ORLEANS**

**LOUISE KORNS,  
ASSISTANT DISTRICT ATTORNEY  
FOR THE PARISH OF ORLEANS**

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**Criminal Courts Building  
2700 Tulane Avenue  
New Orleans, Louisiana 70119**

#### **CERTIFICATE OF SERVICE**

I certify that copies of this Reply Brief of State of Louisiana, Petitioner, have been mailed to:

**John Wilson Reed, Esq.  
2735 Tulane Avenue  
New Orleans, Louisiana 70119**

**Attorney for John Newman**

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